STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2014
v	No. 310249 Genesee Circuit Court
DAVONTRAE JAURICE BENTON, Defendant-Appellant.	LC No. 11-028354-FC

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of second-degree murder, MCL 750.317, four counts of assault with intent to commit murder (AWIM), MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 375 to 600 months (31 ¼ to 50 years) for the second-degree murder and AWIM convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

I. BACKGROUND

Defendant's convictions arise from a November 1, 2010, shooting incident in the city of Flint in which a gunshot was fired into a vehicle driven by Johnny Holden and occupied by five other persons. According to testimony at trial, defendant was upset with Holden for failing to pay a drug debt. Witnesses testified that defendant was driving an Impala and pulled alongside a Monte Carlo that Holden was driving. After defendant demanded his money and Holden told defendant that he did not have it, defendant swerved his vehicle in front of the Monte Carlo in an effort to stop it. Defendant then said "Bye" as he fired a gunshot that struck and killed Holden's six-year-old son, who was in the backseat. Cell phone data indicated that after the offense, defendant drove from Flint to the Detroit area. Two days later, defendant, accompanied by his attorney, turned himself in to the police.

Defendant was charged with open murder, four counts of AWIM, and felony-firearm. In January 2012, defendant pleaded nolo contendere to a lesser charge of manslaughter pursuant to a plea agreement whereby the remaining charges would be dismissed. At the plea hearing, the

prosecutor also indicated that pursuant to an in-chambers discussion with the trial court, there was a *Killebrew*[1] agreement for defendant to be sentenced within the sentencing guidelines range.

At the scheduled sentencing in February 2012, the trial court determined that it could not abide by the *Killebrew* agreement. The court advised defendant that it intended to impose a minimum sentence of 10 years for the manslaughter conviction and asked whether defendant would like to affirm or withdraw his plea. Defense counsel, in defendant's presence, responded by requesting a trial date, prompting the trial court to announce that defendant's plea was being withdrawn. The case proceeded to trial on the original charges.

Trial was held in March 2012. At trial, defense counsel conceded that defendant was at the scene of the shooting, but denied that defendant shot or intended to kill anyone. At defense counsel's request, the trial court instructed the jury that the prosecutor was required to prove beyond a reasonable doubt that defendant did not act in self-defense. As noted previously, the jury convicted defendant of second-degree murder, the four AWIM charges, and felony-firearm.

At defendant's sentencing, he asserted for the first time that he had not consented to defense counsel's withdrawal of his earlier nolo contendere plea. After defendant filed his claim of appeal, this Court granted defendant's motion to remand to allow him to file a motion to vacate his convictions and reinstate the prior nolo contendere plea, and to pursue an evidentiary hearing on his related ineffective assistance of counsel claim. Following an evidentiary hearing in April 2013, the trial court denied defendant's motion to vacate his convictions and reinstate the prior nolo contendere plea.

II. NOLO CONTENDERE PLEA

On appeal, defendant first argues that the trial court violated his fundamental rights by withdrawing his nolo contendere plea without his personal consent. Defendant also argues that defense counsel was ineffective by requesting that the plea be withdrawn without obtaining his consent and by incorrectly advising him that the original plea offer remained available after the plea was withdrawn.

A. STANDARD OF REVIEW

We conclude that defendant failed to preserve his substantive claim that the trial court violated his fundamental rights by failing to obtain his personal consent to the plea withdrawal. The claim is unpreserved because defendant did not raise this issue at any time after the plea was withdrawn and before he was convicted at trial. *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012); *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To be entitled to relief with respect to an unpreserved claim of constitutional error, a defendant must establish "(1) that [an] error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or

[1] *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982).

seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 664-665; 821 NW2d 288 (2012), citing *Carines*, 460 Mich at 763. Nonetheless, to the extent that this issue was considered at the post-trial evidentiary hearing, we have the benefit of the trial court's findings in reviewing defendant's claim. We review the trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant also raises a related claim of ineffective assistance of counsel, which the trial court also addressed and rejected at the post-trial hearing. A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *Id*. As indicated, the trial court's findings of fact are reviewed for clear error, but its resolution of questions of constitutional law are reviewed de novo. *Id*. When a disputed factual issue depends on the credibility of witnesses or the weight of evidence, we defer to the trial court's determination of these matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Vaughn*, 491 Mich at 669.

B. FUNDAMENTAL FAIRNESS

The Due Process Clause of the Fourteen Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). The fundamental decision whether to plead guilty, like the right to testify on one's own behalf, ultimately rests with the defendant. See *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). "Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). But whether a defendant's choice with respect to certain rights must be particularly informed and made personally depends on the right at stake. See *People v Buie*, 491 Mich 294, 305-306; 817 NW2d 33 (2012). A defendant's tacit acquiescence in a decision to plead guilty does not render a plea valid. *Florida*, 543 US at 187-188. Rather, the record must demonstrate that the defendant knew of the rights that he was waiving. *United States v Dominguez Benitez*, 542 US 74, 84 n 10; 124 S Ct 2333; 159 L Ed 2d 157 (2004), citing *Boykin v Alabama*, 395 US 238, 243; 89 S Ct 1709; 23 L Ed 2d 274 (1969). The rationale for requiring this affirmative showing is that a guilty plea is a conviction, which involves the waiver of several constitutional rights, including the right to a jury trial, the right to confront accusers, and the privilege against self-incrimination. *Boykin*, 395 US at 242-243. Conversely, however, where a plea withdrawal does not deprive a defendant of constitutional rights, it may be effectuated by defense counsel without an affirmative showing that the defendant was voluntarily and intelligently withdrawing the plea. See *Weber v Israel*, 730 F2d 499, 506-507 (CA 7, 1984).

In Michigan, the requirements for ensuring that a plea is understandingly, voluntarily, and accurately made are addressed in MCR 6.302. But whether a departure from the court rule warrants relief depends on the nature of the noncompliance. *In re Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975). MCR 6.310 prescribes the procedures for withdrawal of a plea. The essence of defendant's claim is that the trial court did not follow the "consent" requirement

of MCR 6.310(B). At the time of defendant's plea and plea withdrawal, MCR 6.301(B) provided:

> After acceptance but before sentence,
>
> (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).
>
> (2) the defendant is entitled to withdraw the plea if
>
> (a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
>
> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

MCR 6.310(B)(2)(a) embodies the procedures established in *Killebrew*, which holds that a trial court may not make a final acceptance of a plea where there is a specific sentence agreement between the prosecutor and the defendant unless the court has considered the presentence report and concludes that the agreed-upon disposition will serve the interests of justice. These procedures are intended to protect a defendant's right to make a knowing and intelligent wavier of the right to a trial along with companion rights, while preserving the trial court's sentencing discretion. *Id.* at 210.[2] By comparison, MCR 6.310(B)(2)(b) embodies the procedures established in *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), which permits a trial court, on request of a party, to state on the record the length of the sentence the court believes would be appropriate based on the information then available to the court, and provides:

> [A] defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an

[2] In *People v Grove*, 455 Mich 439, 459; 566 NW2d 547 (1997), our Supreme Court clarified that a trial court may reject the entire plea agreement. In *Franklin*, 491 Mich at 916, our Supreme Court clarified that *Grove* was superseded by MCR 6.310(B).

absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation.[3]

In this case, it is unclear from the record whether defendant's plea involved a *Killebrew* sentencing agreement or a *Cobbs* preliminary sentencing evaluation for a sentence within the sentencing guidelines range. But for purpose of this issue, the material fact is that the trial court personally questioned defendant at the January 2012, plea hearing to determine that his plea was knowingly and voluntarily made. Therefore, this case does not involve any tacit acquiescence on the part of defendant to the initial plea decision. In addition, it is clear from the record that defendant was given an opportunity to affirm or withdraw his plea with knowledge that the trial court did not intend to impose a minimum sentence within the guidelines range, and instead intended to impose a minimum sentence of 10 years if defendant elected to affirm his plea. MCR 6.310(B)(2) did not require the trial court to elicit a personal response from defendant regarding the decision whether to affirm or withdraw the plea.

Even if we consider a court's discretionary decision whether to allow a plea withdrawal under MCR 6.310(A), which requires a defendant's motion or consent, there is no requirement that the court personally elicit consent from the defendant. Defendant's reliance on *People v Strong*, 213 Mich App 107, 110-112; 539 NW2d 736 (1995), which involves this Court's interpretation of a prior version of MCR 6.310 that also contains the motion or consent provision in subsection (A), is misplaced. This Court held only that a trial court's discretion to vacate a plea was limited by the parameters of the court rule and, accordingly, the court could not vacate an accepted plea on its own motion. *Id*.

Moreover, following the evidentiary hearing, the trial court found that defendant "consented to the withdrawal of his plea by standing there . . . and not saying anything when the Court directly asked him and allowing his lawyer to speak on his behalf." The video recording of the February sentencing proceeding supports the trial court's finding, and does not support defendant's evidentiary hearing testimony that when defense counsel requested a trial date, defendant turned to defense counsel, "looked at him crazy," and asked him what he was doing. In light of this evidence, and giving deference to the trial court's superior opportunity to observe defendant at both the February 2012 sentencing proceeding and the April 2013 evidentiary hearing, its finding that defendant consented to counsel's withdrawal of the plea was not clearly erroneous. Defendant has not shown a plain error affecting his substantial rights.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant's right to the effective assistance of counsel extends to the plea-bargaining process. *Lafler v Cooper*, 566 US ___ ; 132 S Ct 1376, 384; 182 L Ed 2d 398 (2012). But a court must strongly presume that defense counsel rendered adequate assistance and exercised reasonable professional judgment when making all significant decisions. *Burt v Titlow*, ___ US

[3] Pursuant to *People v Williams*, 464 Mich 174, 179-180; 626 NW2d 899 (2001), a trial court is not required to announce the specific sentence that it will impose when it informs a defendant that the *Cobbs* limits will not be observed.

___; 134 S Ct 10, 17; 187 L Ed 2d 348 (2013); *Vaughn*, 491 Mich at 670. The burden rests on the defendant to show that counsel's performance was deficient. *Burt*, ___ US at ___; 134 S Ct at 17.

"A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea." *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012). Although the same considerations are relevant to entering a plea or withdrawing a plea, absent evidence that counsel gave incorrect advice or failed to give material advice, the defendant cannot establish deficient performance. *Burt*, ___ US at ___; 134 S Ct at 17.

In this case, the record indicates that defense counsel was advised four days before the scheduled sentencing in February 2012 that the trial court was unlikely to accept the sentence agreement and that defendant met with defense counsel and was told that there was a problem with the plea. The trial court considered this evidence, as well as defendant's background and demonstrated ability to speak on his own behalf, as he had done during allocution at the February 2012 sentencing proceeding, to find that defendant did not speak up when defense counsel asked for a trial date after the court announced that it was unable to abide by the sentence agreement, because defendant had already decided to go trial if the court would not impose a sentence within the sentencing guidelines range. Giving deference to the trial court's assessment of the credibility of the witnesses and the weight to be accorded the evidence, the trial court's finding was not clearly erroneous. Because the trial court did not clearly err by finding that defense counsel's withdrawal of defendant's plea was done with defendant's consent, it follows that defense counsel's conduct was not objectively unreasonable. Defendant failed to satisfy his burden of showing that counsel's performance was deficient.

Defendant also argues that defense counsel erroneously advised him that he could still plead to manslaughter at any time before the jury returned its verdict, and that counsel was ineffective for waiting too long to ask the prosecutor to reinstate the plea agreement. However, the trial court discredited defendant's testimony and found that defendant never made "a specific request of [defense counsel] to get him the plea agreement and not continue this trial." Again, under the circumstances and giving deference to the trial court's credibility determination, this finding was not clearly erroneous. Defendant has not established that defense counsel was ineffective.

III. MOTION FOR ADJOURNMENT

Defendant next argues that the trial court erred by denying his motion to adjourn on the first day of trial. We disagree. We review a trial court's decision to deny an adjournment for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003; *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Constitutional issues are reviewed de novo. *Vaughn*, 491 Mich at 650.

In *Coy*, 258 Mich App at 18-19, this Court explained:

> [T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence. *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). "Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion.

The record does not support defendant's claim that defense counsel requested an adjournment to prepare to meet newly discovered evidence regarding defendant's cell phone records. Although defense counsel raised several discovery issues before moving for an adjournment, the trial court separately addressed each discovery matter. Indeed, the court conducted an evidentiary hearing on the second day of trial to determine whether the prosecutor would be allowed to call her cell phone expert. Defense counsel remarked at that hearing, "I guess we [are] making a lot of hoopla about nothing," because counsel understood that the expert would be able to place defendant in the vicinity of the shooting, but defendant was not contesting that fact.

In any event, the circumstances as presented to the trial court at the time were insufficient to establish good cause for an adjournment. The record reflects that at least two prior adjournments were granted in 2011 on motions made by defense counsel. And although defense counsel asserted defendant's constitutional right to the effective assistance of counsel when moving for an adjournment, he did not identify any particular area where preparation was necessary to present a defense. At the mid-trial evidentiary hearing, the trial court found that defense counsel received sufficient information to inform him of the expert's name and where he could obtain cell phone records before trial. For these reasons, the trial court did not abuse its discretion by denying another adjournment.

IV. UNRESPONSIVE TESTIMONY

Defendant next argues that reversal is required because Flint Police Detective Sergeant Brett Small gave unresponsive testimony that infringed upon defendant's postarrest right to remain silent. We disagree. Although defense counsel interrupted Sergeant Small's testimony at one point to object that it was unresponsive, counsel did not object when Sergeant Small thereafter testified that defense counsel did not allow him or his partner to speak to defendant. In addition, defendant did not move for a mistrial or move to strike the allegedly improper testimony. Thus, this issue was not preserved and we limit our review to plain error affecting defendant's substantial rights. *Carines*, 461 Mich at 762-763; MRE 103(a)(1).

Unresponsive or volunteered testimony to a proper question is generally not grounds for a mistrial. *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). Any error may generally be cured by a timely motion to strike the testimony and request for a cautionary instruction. *People v Barker*, 161 Mich App 296, 306-307, 409 NW2d 813 (1987). But "when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to

make sure the officer has not ventured into forbidden areas which may prejudice the defense." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983).

"As a general rule, if a person remains silent after being arrested and given *Miranda*[4] rights, that silence may not be used against that person." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). A breach of the implied assurance of the *Miranda* warning would constitute an affront to the fundamental fairness required by the Due Process Clause. *Id*. at 213. Whether reversal is required because of a reference to a defendant's postarrest, post-*Miranda* silence depends on the circumstances of the case. *Id.* at 218.

In this case, defense counsel questioned Sergeant Small about the discovery of bullet holes in the side of defendant's Impala. Counsel attempted to elicit Sergeant Small's opinion that there could have been a shootout between defendant and Holden. Sergeant Small denied having formed that opinion and attempted to explain his reasoning. Sergeant Small remarked that defense counsel did not allow him and his partner to speak with defendant, which Sergeant Small acknowledged was "[defendant's] legal right and I understand that." Even if this brief testimony was unresponsive to defense counsel's specific question concerning the bullet holes in the Impala, it did not constitute plain error affecting defendant's substantial rights because it did not suggest that defendant's silence should be used against him and it was not exploited by the prosecutor. See *People v Dennis*, 464 Mich 567, 581, 628 NW2d 502 (2001). The additional testimony challenged by defendant regarding this subject matter was responsive to defense counsel's questions.

V. DRUG PROFILE EVIDENCE

Defendant next argues that the prosecutor elicited impermissible drug profile testimony from Flint Police Detective Karl Petrich. We disagree.

Defendant does not challenge the trial court's decision to qualify Detective Petrich as an expert in the field of narcotic sales. Defendant's sole claim is that Detective Petrich gave impermissible "drug profile" testimony.

Drug profile evidence has been described as an informal compilation of characteristics often displayed by those trafficking in drugs. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). The evidence is considered inherently prejudicial because the drug profile may suggest that innocuous events indicate criminal activity. *Id.* But "courts generally have allowed expert testimony to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity." *Id*. at 53. Even when a police officer gives expert testimony on innocuous characteristics, the testimony has been allowed when it indicates that the defendant's activities are in accord with the usual criminal modus operandi. *Id*. at 54. But the testimony is impermissible where an expert moves beyond an explanation of the typical characteristics of drug dealing and opines that the defendant is guilty merely because he fits the drug profile. *Id.*

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The four factors relevant to distinguishing between the appropriate and inappropriate use of drug profile evidence are (1) "the reason given and accepted for the admission of the profile testimony must be for a proper purpose use—to assist the jury as background or modus operandi explanation," (2) "the profile, without more, should not normally enable a jury to infer defendant's guilt," (3) the trial court's instructions to the jury on the proper and limited use of drug profile testimony, and (4) the expert should not express his opinion, based on a profile, that the defendant is guilty. *Murray*, 234 Mich App at 56-57.

Because this case did not involve drug charges, the concerns expressed in *Murray* regarding the use of innocuous characteristics to convict an innocent person of a drug offense are not present. The challenged testimony was relevant to corroborate Holden's testimony that defendant committed the charged crimes because of a drug debt. Moreover, the testimony only partially pertained to drug profile evidence. Detective Petrich testified that he participated in the execution of a search warrant at a house to look for evidence in connection with a homicide. Other testimony indicated that defendant resided in the house.

Detective Petrich testified that a digital scale seized from the house was "an indicator of drug activity at the house." Detective Petrich also testified that the presence of the digital scale, cash, and guns in the house meant to him that there was "[d]rug activity at the house." He later reiterated that the items indicated to him that "drugs were being sold from the home or weighed at the home" and that it was a "drug house." However, Detective Petrich also conceded on cross-examination by defense counsel that he did not find any illicit drugs or anything illegal in the house.

Examined as a whole, the challenged testimony could properly be characterized as drug profile evidence because Detective Petrich gave an opinion based on a compilation of innocuous characteristics that there was drug activity in the house. *Murray*, 234 Mich App at 53. However, Detective Petrich did not express any opinion regarding defendant. Further, the prosecutor did not use Detective Petrich's testimony for an impermissible purpose, but merely to help the jury understand implications of the items. See *id.* at 60. In addition, Detective Petrich's testimony was clearly insufficient for the jury to infer defendant's guilt of any charged crimes in this case, and the prosecutor did not argue that the jury should make this inference. Rather, the prosecutor argued, when addressing the murder charge, that defendant's intent could be inferred from his actions and that "defendant's intent can be proven by what he said, what he did, how he did it. I want my money now; that's what he said." And while the jury was not given a limiting instruction on the use of the evidence, MRE 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added). Defendant does not argue that he requested a limiting instruction.

Considering all relevant factors, we cannot conclude that the prosecutor introduced Detective Petrich's testimony for an impermissible purpose. We perceive no error requiring reversal.

VI. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor improperly argued during closing argument that a prior statement made by defendant's cousin, to the effect that defendant admitted shooting someone, could be used as substantive evidence. The record discloses that the prosecutor referred to defendant's cousin twice during closing argument. During the second reference, the prosecutor commented on differences between the cousin's trial testimony and the testimony of Flint Police Detective Sergeant Jeff Collins regarding prior statements by the cousin concerning what defendant told her about a shooting. Defendant did not object to the prosecutor's remarks, leaving this issue unpreserved. Accordingly, defendant has the burden of showing a plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Viewed in context, it is apparent that the prosecutor was not asking the jury to consider the cousin's prior statements as substantive evidence of guilt. Thus, any error does not rise to the level of a plain error. See *Carines*, 460 Mich at 763 (a plain error is one that is clear or obvious). Moreover, the trial court instructed the jury that "[i]f you believe that a witness previously made a statement inconsistent with his or her testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court." Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The trial court's jury instruction was sufficient to protect defendant's substantial rights. Defendant is not entitled to appellate relief on the basis of this issue.

VII. SELF-DEFENSE INSTRUCTION

Defendant also argues that the trial court erred by instructing the jury that the prosecution had the burden of disproving self-defense beyond a reasonable doubt without further instructing the jury on the elements of self-defense. Because the trial court gave the specific jury instruction requested by defense counsel, who affirmatively expressed his satisfaction with the instructions as given, we conclude that defendant's claim of instructional error has been waived, leaving no error to review. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). Therefore, we limit our review to defendant's additional claim that defense counsel was ineffective for not requesting additional instructions explaining the concept of self-defense. Because no *Ginther*[5] hearing was held in connection with this claim, our review is limited to errors apparent from the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Defendant does not identify the exact self-defense instruction that he claims should have been provided to the jury. We note, however, that our Supreme Court has declined to recognize a defense of imperfect self-defense in Michigan, whereby murder may be mitigated to manslaughter when the defendant is the initial aggressor. See *People v Reese*, 491 Mich 127, 148-153; 815 NW2d 85 (2012). Further, although the trial court agreed to instruct the jury that

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the prosecution had the burden of disproving traditional self-defense, it is apparent that there were problems with this defense theory.

At common law, the defense of self-defense was available to a nonaggressor to excuse otherwise punishable criminal conduct. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). Effective October 1, 2006, the Legislature modified the common-law duty to retreat by enacting the Self-Defense Act, MCL 780.971 *et seq*., but left other provisions of the common law relating to self-defense intact. *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013); MCL 780.973; MCL 780.974. Under both the common law and the Self-Defense Act, lawful self-defense requires that the defendant must have had an honest and reasonable belief of imminent death or harm. *Dupree*, 486 Mich at 707-708; *Guajardo*, 300 Mich App at 35-36; MCL 780.972.

Although the trial court found that there was evidence from which defense counsel could argue that more than one gunshot was fired, there was no evidence that Holden possessed a gun or threatened defendant before his son was shot. Even if it could be inferred from circumstantial evidence that Holden had a gun, there was no evidence to support a reasonable inference that Holden was the initial aggressor in his encounter with defendant. A proper instruction on lawful self-defense would have highlighted the deficiencies in the evidence in support of self-defense. Moreover, it would have been inconsistent with the predominant defense theory that defendant was not the shooter. Under these circumstances, defendant has not overcome the strong presumption that defense counsel's performance was objectively reasonable. Even if counsel's failure to request additional instructions could be considered deficient, considering the lack of evidence that defendant fired a gun in self-defense, there exists no reasonable probability that, but for the error, the result of the proceeding would have been different. Therefore, reversal on this basis is not warranted.

VIII. FLIGHT INSTRUCTION

Defendant lastly argues that the trial court erred by instructing the jury on flight. We review the trial court's decision to give the flight instruction for an abuse of discretion. *Guajardo*, 300 Mich App 34. Evidence of a defendant's flight, such as fleeing the scene of a crime, is admissible to support an inference of a consciousness of guilt. *Unger*, 278 Mich App at 226. Evidence was presented that shortly after the offense, defendant traveled a substantial distance from the Flint area with knowledge that he had shot Holden's child. This evidence supported a flight instruction. See *Unger*, 278 Mich App at 226. It was not necessary that the prosecutor prove that defendant was motivated by a fear of apprehension. *People v Smelley*, 485 Mich 1023; 776 NW2d 310 (2010). Further, defendant's subsequent conduct, namely turning himself in to the police, did not preclude an inference that his initial flight arose from a consciousness of guilt. *Id*. The trial court did not abuse its discretion by instructing the jury on flight.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen